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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

EPIC GAMES, INC.,

Plaintiff,

vs.

APPLE INC.,

Defendant.

No. 3:20-CV-05640-EMC

**DECLARATION OF NICHOLAS
PENWARDEN IN SUPPORT OF
PLAINTIFF EPIC GAMES, INC.'S
MOTION FOR A TEMPORARY
RESTRAINING ORDER AND ORDER
TO SHOW CAUSE WHY A
PRELIMINARY INJUNCTION
SHOULD NOT ISSUE**

Date: August 17, 2020

Courtroom: 5, 17th Floor

Judge: Hon. Edward M. Chen

1 I, Nicholas Penwarden, declare as follows:

2 1. I am Vice President of Engineering at Epic Games, Inc. ("Epic"). I submit this
3 declaration in support of Epic's Motion for a Temporary Restraining Order and Order to Show
4 Cause Why a Preliminary Injunction Should Not Issue.

5 2. I have been Vice President of Engineering at Epic for over a year. In my current
6 position, I am responsible for outlining and executing the vision for the development of the
7 company's *Unreal Engine* software, which is a software suite available to third-party developers
8 that allows them to create three-dimensional and immersive digital content. I am responsible for
9 the development roadmap for the *Unreal Engine* and management of the engineering team behind
10 the *Unreal Engine*, and I am ultimately responsible for user support for the *Unreal Engine's*
11 community of 11 million users. Throughout the time that I have been involved with the *Unreal*
12 *Engine*, the *Unreal Engine* has received numerous technology and entertainment industry awards,
13 including an Emmy Award for Technology and Engineering for its use in the production of
14 animation. Prior to my time as Vice President of Engineering, I was the Director of the *Unreal*
15 *Engine*, the Development Manager for *Unreal Engine 4*, the Lead Graphics Programmer and a
16 Senior Engine Programmer at Epic.

17 3. As described in more detail in the Declaration of Timothy Sweeney, dated August
18 17, 2020, the *Unreal Engine* has applications across a broad range of industries, including very
19 wide adoption for the development of video games. One reason for the *Unreal Engine's*
20 popularity among game developers is the breadth of its cross-platform capabilities. Historically,
21 *Unreal Engine 3* (the previous iteration of the engine, which was released in 2004) supported
22 software developed to run on Windows PC, PlayStation 3, and Xbox360. In 2010, Epic expanded
23 *Unreal Engine's* capabilities to support the iOS and Android platforms as well, allowing
24 developers to offer their *Unreal*-powered applications on players' smartphones and tablets. As of
25 today, *Unreal Engine 4*, which was released in 2014, supports Windows PCs, macOS,
26 PlayStation 4, PlayStation 5, Xbox One, Xbox Series X, Nintendo Switch, iOS, Android and
27 Stadia. *Unreal Engine 5* was publicly announced on May 13, 2020, and is currently scheduled for
28 release next year.

1 4. A large number of developers have used the *Unreal Engine* in developing apps for
2 use on Apple platforms. As of today, the *Unreal Engine* toolkit has been installed on almost half
3 a million Mac computers and is used by millions of developers overall to develop their games and
4 other software. Third-party developers have used the *Unreal Engine* to create some of the top
5 apps currently on the App Store. For example, the popular game PlayerUnknown's Battlegrounds
6 ("PUBG") alone is installed on hundreds of millions of mobile devices.

7 5. Like other platform providers, Apple makes certain software development tools
8 widely available to developers that make programs intended to run on iOS and macOS. Apple's
9 core tool is Xcode, which provides developers the software features they need to design, develop,
10 and debug software for use on iOS and macOS. Apple also offers developers software
11 development kits ("SDKs"), which extend the core Xcode to include additional tools including
12 "compilers" (computer programs important to software development because they translate
13 programmed computer code into machine code readable and executable by a computer) and other
14 frameworks that a developer needs to ensure their game or software will work on Apple's
15 devices. For a fee of \$99 a year—paid for each separate Apple Developer Program account, of
16 which Epic has several—a developer obtains the ability to test and deploy software that runs on
17 iOS and macOS using Apple's Xcode and other tools.

18 6. On August 14, 2020, at 12:04 am Pacific time, Apple posted a notice in one of
19 Epic's accounts with the Apple Developer Program, which stated that it intends to terminate
20 Epic's membership within 14 days unless Epic meets certain conditions set by Apple. Without
21 participation in the Apple Developer Program, developing commercial software to run on Apple
22 iOS devices is impossible. Indeed, without an Apple Developer Program account, developers are
23 not able even to test their software on their own personal iOS devices, much less develop and
24 distribute applications for public consumption.

25 7. Apple's August 14 notice also contains a list of additional consequences that it
26 says will flow from the termination of Epic's Developer Program Account. That list expressly
27 mentions consequences for the *Unreal Engine*. One item on the list is that Epic will "lose access"
28 to "[a]ll Apple software, SDKs, APIs [application programming interfaces], and developer tools".

1 These are software and tools of the type that platform providers—including Apple, Microsoft,
2 Google and others—make widely available to developers in order to facilitate the development of
3 software that will run on the platforms. These tools are typically made available by platform
4 providers either for free or at a modest cost.

5 8. Apple’s revocation of its developer software and tools will make it impossible for
6 Epic to continue to support Apple’s platforms, as Epic will lose the ability to create new versions
7 of *Unreal Engine* for use on both iOS and macOS. It also means that as Apple upgrades its own
8 operating systems, Epic will not be able to develop updated versions of *Unreal Engine* designed
9 to support those updates. Apple has already announced plans to release updated versions of iOS
10 and macOS—called iOS 14 and macOS Big Sur, respectively—this coming fall. Without access
11 to the software and development tools that Apple makes widely available, Epic will not be able to
12 support iOS 14 or macOS Big Sur with *Unreal Engine*. Additionally, Apple typically requires
13 that developers fully switch to Apple’s latest SDKs and developer tools six months after the
14 release of a new iOS version in order to submit new apps, or to submit updates to existing apps.
15 Thus, by spring 2021, it is likely that Apple will refuse to accept any new apps and updates to
16 existing apps that use the *Unreal Engine* due to Epic’s inability to access those tools.

17
18 Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true
19 and correct and that I executed this declaration on August 17, 2020, in Chapel Hill, North
20 Carolina.

21
22 /s/ Nicholas Penwarden
23 Nicholas Penwarden
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1 I hereby attest that I have on file all holographic signatures corresponding to any
2 signatures indicated by a conformed signature (/S/) within this e-filed document.

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4 /s/ Paul J. Riehle
Paul J. Riehle
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